

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 04-09

**In the matter of Amendment of the Rules of
Evidence: Wis. Stat. §§ 908.03 (6), 909.02 (12)
and 909.02 (13), Relating to Domestic and
Foreign Records of Regularly Conducted Activity**

FILED**OCT 28, 2005**

Cornelia G. Clark
Clerk of Supreme Court
Madison, WI

On October 25, 2004, Attorney Jason J. Hanson filed a petition, as amended on January 10, 2005, seeking to amend Wis. Stat. § 908.03 (6), and to create Wis. Stat. §§ 909.02 (12) and 909.02 (13), relating to domestic and foreign records of regularly conducted activity. A public hearing on the petition was conducted on March 15, 2005. At the ensuing open administrative conference the court requested some additional information, which Attorney Hanson provided to the court.

By letter dated August 11, 2005, the court solicited comment on the petition from the Office of the State Public Defender, the State Bar of Wisconsin, the Judicial Council, the Dean of the Marquette University Law School, and the Dean of the University of Wisconsin Law School. The State Public Defender provided comments on the petition by letter dated October 12, 2005. The Judicial Council provided certain comments and

recommended adoption of the petition. No objection to the proposal was received.

At its open administrative conference on October 25, 2005, the court discussed the petition again, including the question whether a time certain, rather than a "fair opportunity to challenge" would be appropriate in proposed s. 909.02 (12). Ultimately, the court agreed with the Judicial Council's conclusion that the "fair opportunity to challenge" language provides better guidance to courts and litigants. The court voted unanimously to adopt the petition with certain changes, effective January 1, 2006, as follows:

Section 1. 908.03 (6) of the statutes is amended to read:

908.03 (6) Records of regular conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02 (12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Comment

This amendment conforms Wisconsin's rule to the 2000 amendment of Rule 803 (6) of the Federal Rule of Evidence.

Comment

The Judicial Council advised the court of its concern and desire that the proposed amendment to Wis. Stat. § 908.03 (6) not be viewed to change the law as expressed in State v. Williams, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, regarding records of an investigation conducted for the particular purpose of litigation.

Section 2. 909.02 (12) of the statutes is created to read:

909.02 (12) Certified domestic records of regularly conducted activity. (a) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under s. 908.03 (6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with any statute or rule adopted by the supreme court, certifying all of the following:

1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

2. That the record was kept in the course of the regularly conducted activity.

3. That the record was made of the regularly conducted activity as a regular practice.

(b) A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of the offer of the record and certification into evidence to provide an adverse

party with a fair opportunity to challenge the record and certification.

Comment

Creation of sub. (12) conforms Wisconsin's rule to the 2000 amendment of Rule 902 (11) of the Federal Rule of Evidence.

Section 3. 909.02 (13) of the statutes is created to read:

909.02 (13) Certified foreign records of regularly conducted activity. (a) The original or a duplicate of a foreign record of regularly conducted activity that would be admissible under s. 908.03 (6) if accompanied by a written declaration by its custodian or other qualified person certifying all of the following:

1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

2. That the record was kept in the course of the regularly conducted activity.

3. That the record was made of the regularly conducted activity as a regular practice.

(b) The declaration under par. (a) must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of the offer of the record and declaration into evidence to provide

an adverse party with a fair opportunity to challenge the record and declaration.

Comment

Creation of sub. (13) conforms Wisconsin's rule to the 2000 amendment of Rule 902 (12) of the Federal Rule of Evidence.

IT IS ORDERED that notice of this amendment of Wis. Stat. § 908.03 (6), and creation of Wis. Stat. §§ 909.02 (12) and 909.02 (13) be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

IT IS FURTHER ORDERED that the Comments to these rules are not adopted but shall be printed for information purposes.

Dated at Madison, Wisconsin, this 28th day of October, 2005.

BY THE COURT:

Cornelia G. Clark
Clerk of Supreme Court

